KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 25, 2018

Audrey Carmical
General Counsel
Texas Department of Family and Protective Services
701 West 51st Street
Austin, Texas 78751

Re: Inapplicability of the Indian Child Welfare Act to Texas Child Custody Proceedings

Dear Ms. Carmical:

On October 4, 2018, a federal court in Fort Worth declared most of the Indian Child Welfare Act and its implementing regulations unconstitutional. *See Brackeen v. Zinke*, No. 4:17-cv-00868-O, -- F. Supp. 3d --, 2018 WL 4927908, at *1 (N.D. Tex. Oct. 4, 2018). Texas and two other states were parties to the lawsuit, so the ruling is binding on Texas. This letter summarizes the case and the scope of the ruling so that Texas may prepare to comply.

Statutory and Regulatory Background

The Indian Child Welfare Act ("ICWA"), 25 U.S.C. §§ 1901–1963, is a federal law that governs state child custody proceedings involving Indian children. The statute establishes foster care, preadoption, and adoption placement preferences for Indian children, a standard for when state courts may depart from those placement preferences, standards and responsibilities for state agencies and courts to follow when working with Indian children in these proceedings, and consequences flowing from noncompliance with the statute's requirements. *Brackeen*, 2018 WL 4927908, at *2. As to the placement of Indian children, ICWA requires States to prefer placements with an Indian child's family, tribe, or another Indian tribe. 25 U.S.C. § 1915. ICWA permits the Indian child's tribal court to establish a different order of placement preferences than those set by Congress in the statute, and state courts must follow such orders as long as the placement is the least restrictive setting appropriate for the needs of the child. *Id.* § 1915(c).

In June 2016, the Department of Interior's Bureau of Indian Affairs ("BIA") promulgated a Final Rule that purported to clarify the federal standards governing the implementation of ICWA and ensure consistency among the States. 25 C.F.R. § 23.101. In particular, the Final Rule changed the definition of the "good cause" exception to the placement preferences and the evidentiary standard required to show good cause. *Id.* § 23.132. The Final Rule also placed additional responsibilities on States to determine if a child is an Indian child as defined by ICWA. *See, e.g., id.* §§ 23.107, .140, .141.

The Litigation

Last year, three States—Texas, Louisiana, and Indiana (collectively, "State Plaintiffs")—and seven individuals who have either adopted an Indian child or who are attempting to adopt an Indian child, brought suit against the United States of America, the Departments of Interior and Health and Human Services, the BIA, and the chief officials of those departments, in the United States District Court for the Northern District of Texas, challenging the constitutionality of ICWA and the final rule. *Brackeen*, 2018 WL 4927908, at *1. The Cherokee Nation, Oneida Nation, Quinalt Indian Nation, and Morengo Band of Mission Indians (collectively, "Tribes") intervened in the lawsuit to defend the law and regulation.

On October 4, the District Court granted plaintiffs' motion for summary judgment and declared ICWA and the Final Rule unconstitutional. The Court held that ICWA violated the Fifth Amendment's guarantee of equal protection by imposing race-based placement preferences, Article I of the Constitution by delegating to tribes the authority to reorder the placement preferences, the Tenth Amendment by commandeering state power over domestic relations, and the Commerce Clause of Article I because it exceeded Congress's authority to enact the law. *Brackeen*, 2018 WL 4927908, at *10–18. As to the Final Rule, the Court made three rulings. First, it found that 25 C.F.R. §§ 23.106–112, §§ 23.114–19, §§ 23.121–22, §§ 23.124–28, and §§ 23.130–132 must be set aside under the Administrative Procedure Act because they regulate unconstitutional portions of ICWA. *Brackeen*, 2018 WL 4927908, at *18. Second, the Court ruled that 25 C.F.R. §§ 23.106–122, .124–132, and .140–141 are invalid to the extent that they are binding on the State Plaintiffs. *Brackeen*, 2018 WL 4927908, at *20. Third, the Court found that the BIA lacked the authority to adopt a change to the "good cause" exception, and, thus, 25 C.F.R. § 23.132 is contrary to law. *Brackeen*, 2018 WL 4927908, at *22.

The Scope of the District Court's Ruling

The District Court issued a declaratory judgment that the following provisions of ICWA and the Final Rule are unconstitutional: 25 U.S.C. §§ 1901–23, 25 U.S.C. §§ 1951–52, 25 C.F.R. §§ 23.106–22, 25 C.F.R. §§ 23.124–32, and 25 C.F.R. §§ 23.140–41. The Court left intact an unchallenged federal funding program for Indian child and family programs. 25 U.S.C. § 1931–1934.

When a court issues a declaratory judgment, it adjudicates a dispute between parties to a lawsuit. 28 U.S.C. § 2201; *see Miller v. Jennings*, 243 F.2d 157, 160 (5th Cir. 1957); *Dickey's Barbecue Restaurants, Inc. v. Mathieu*, No. 3:12-cv-5119-G, 2013 WL 5268976, at *6 (N.D. Tex. Sept. 18, 2013). The parties must abide by the decision and direct their actions accordingly. By comparison, when a court issues an injunction, it restrains another party from doing something specifically, such as a federal agency from enforcing a law or regulation. *Texas v. United States*, 809 F.3d 134, 187–88 (5th Cir. 2015). A district court's injunction against a federal agency can have a nationwide effect, but a declaratory judgment from such a court does not. Thus, the Court's declaratory judgment that ICWA is unconstitutional binds the parties: Texas, Louisiana, Indiana, the individual plaintiffs, the federal government defendants, and the tribes that are intervening defendants. All Texas agencies, political subdivisions, and courts are bound by the Court's ruling as to the challenged federal law because Texas was a party to the lawsuit.

In contrast to a law, when a district court finds a federal regulation unconstitutional or unlawful, it must "set aside" the regulation, 5 U.S.C. § 706(2), which is an order that applies nationwide, *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989). Thus, the Court's declaratory judgment setting aside the Final Rule applies nationwide. The Final Rule cannot be applied as law by any state agency or court.

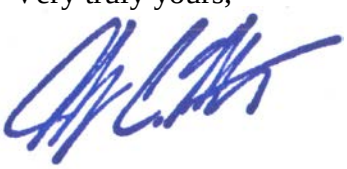
Next Steps

On October 10, 2018, the Tribes asked the Court to stay its final judgment pending appeal. That motion is fully briefed, and the Court could issue a decision any day. If the Court denies a stay or if the Court takes too long to decide whether to issue a stay, then it is likely that the Tribes will ask the U.S. Court of Appeals for the Fifth Circuit for a stay pending appeal. If either court stays the final judgment, then ICWA and the Final Rule will still be in effect across the nation, including Texas, likely pending final resolution of all appeals.

It is difficult to predict whether the District Court or Fifth Circuit will issue a stay pending appeal. Thus, we recommend that DFPS begin preparing to comply with the Court's ruling. DFPS should notify caseworkers, in-house attorneys, District Attorneys, and state courts that ICWA and the Final Rule are no longer good law and should not be applied to any pending or future child custody proceeding in Texas. Now DFPS should handle these ICWA cases as it would any child welfare or custody proceeding according to Texas law. For pending cases involving Indian children, caseworkers and attorneys may want to discuss those particular situations with DFPS and determine how to proceed. Finally, we appreciate you granting us permission to share this letter with other concerned entities.

Please do not hesitate to contact us if you have any questions.

Very truly yours,



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